EMPLOYMENT TRIBUNALS

Claimant: **Ms E Woodward-Bennett**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: **Cardiff via CVP** **On: 13 August 2021**

Before: **Employment Judge S Jenkins**

Representation:
Claimant: In person
Respondent: Mr J Walters (Counsel)

JUDGMENT having been sent to the parties on 18 August 2021, and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The Claimant submitted a claim form on 4 May 2021 in which she contended that her dismissal on 27 April 2021 was, amongst other things, unfair pursuant to Section 103A Employment Right Act 1996 ("ERA") on the ground that the reason or, if more than one, the principal reason for her dismissal was that she had made a protected disclosure. Within that claim the Claimant included an application for interim relief which complied with the requirements of Section 128(2) ERA.

Law

2. Section 128(1) ERA provides that an application for interim relief can be made where a claim includes a claim such as that brought by the Claimant in this case, of unfair dismissal pursuant to Section 103A ERA.

3. Section 129 ERA sets out the possible outcomes of a successful interim relief application, but they are predicated on a conclusion, as set out in Section 129(1), that it is likely that on determining the complaint to which the application relates the Employment Tribunal will find that the reason or, if more than one the principal reason, for the dismissal is that the Claimant had made a protected disclosure.

4. In terms of the approach to interim relief hearings, Rule 95 of the Employment Tribunal Rules of Procedure notes that an Employment Tribunal in considering such an application will not hear oral evidence unless it directs otherwise.

5. In terms of the prevailing law, Mr Recorder Luba QC, in the Employment Appeal Tribunal decision of ***London City Airport Limited -v- Chacko*** **UK EAT 0013/13**, noted that the consideration of whether it appears likely that a Claimant will establish their claim at a final earing involves an "*expeditious summary assessment by the first instance Employment Judge as to how the matter looks to him on the material that he has*". He went on to say that this, "*must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will ultimately be undertaken at the full hearing of the claim*".

6. Mr Recorder Luba QC in the ***Chacko*** case also re-affirmed the standard that is to be applied by the Employment Judge in assessing whether it is likely that a claimant will establish the claim at the final hearing, noting the long established guidance from the EAT in ***Taplin -v- C Shippam Limited*** **[1978] ICR 1068** that the employee must demonstrate a "*pretty good chance of success*".

7. The EAT also, in ***Ministry of Justice -v- Sarfraz*** **[2011] IRLR 562**, gave further guidance that the test involves, "*something nearer to certainty than mere probability*". The ***Sarfraz*** decision also noted that, in a case such as this, the Claimant must show that it is likely that the Tribunal at a final hearing will find five things; (1) that the Claimant had made a disclosure to her employer, (2) that she believed that that disclosure tended to show one or more of the things itemised at sub-sections (a) – (f) under Section 43B(1), (3) that the belief was reasonable, (4) (in the terms as they currently apply, as the law has changed slightly since the Sarfraz judgment) that the disclosure was made in the public interest, and (5) that the disclosure was the principal reason for the dismissal.

8. With regard to the constituent elements of establishing a case under Section 103A, I was conscious of the guidance from the EAT, in ***Cavendish Munro Professional Risk Management Limited -v- Geduld*** **[2010] ICR 325**, that, for there to be a disclosure, there must be a disclosure of information in the

sense of conveying facts, and that a general allegation would not be sufficient. I also noted the clarification of that provided by the Court of Appeal, in ***Kilraine -v- London Borough of Wandsworth*** **[2018] ICR 1850**, that the disclosure must have sufficient factual content to be capable of tending to show the relevant matters set out in Section 43B(1.

9. I also noted that the reasonable belief that the disclosure tends to show the relevant matter, is the reasonable belief of the worker making the disclosure i.e. the Claimant herself in this case, and that the EAT, in ***Korashi -v- Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**, indicated that that involves applying an objective standard to the personal circumstances of the discloser.

Background circumstances

10. I did not hear evidence in this case, only reading the documents to which my attention was drawn, which included two witness statements on behalf of two of the Respondent's employees and the parties' submissions. I therefore made no findings of fact, but the background circumstances to the case were briefly as follows.

11. The Claimant was employed by the Respondent as a Clinical Lead at Llandough Hospital, her employment having commenced in 2004. In August 2019, on return from a period of annual leave, the Claimant was informed that complaints about her management style and practice had been raised in her absence by several employees. That led to an investigation and, some significant time later, in April 2021, to her dismissal on the ground of gross misconduct.

12. The Claimant contends that that dismissal was unfair and also that it derived from protected disclosures she asserted she made in the months prior to her absence in August 2019, commencing in fact in April 2019. The Claimant contends that those disclosures, involving the method of moving beds containing patients between operating theatres and wards, involved concerns regarding the health and safety of individuals, principally that of the patients as the practice involved the accompanying nurse assisting in the movement of the bed by pushing from behind as opposed to travelling alongside the bed, which had been the previous practice. The essence of the Claimant's concern was that the nurse would be less able to notice, and to react to, any deterioration in the patient's health during the movement.

The disclosures

13. The precise disclosures contended by the Claimant to amount to protected disclosures were not clear from her fairly brief claim form. At the start of the hearing I therefore asked her to clarify what precisely she contended

amounted to protected disclosures. She indicated that there were seven such disclosures, although, as Mr Walters subsequently pointed out, not all of them actually appear in her claim form. They were briefly as follows:

a. A verbal disclosure to her Manager, Mr Barada, on 23 April 2019, subsequently confirmed in an email of the same date.

b. An email from a colleague, again to Mr Barada, dated 8 May 2019, in which the colleague referenced health and safety issues and referred to agreeing with the Claimant.

c. An email from the Claimant to one of her Managers, Ms Chin, dated 23 May 2019.

d. Comments made by her in a governance meeting attended by several of the Respondent's Managers dated 19 June 2019.

e. A further email from the Claimant to more senior managers, Ms Chin and Ms Wade, on 25 June 2019.

f. An email exchange with Mr Barada on 27 June 2019.

g. An email from a nurse reporting to the Claimant, on 14 June 2019, which the Claimant forwarded, without comment, to Mr Barada on 17 June 2019.

Conclusions

14. I first considered whether the disclosures contended to have been made by the Claimant were likely, in my view, to be established as protected disclosures at the final hearing. Mr Walters, fairly and helpfully, indicated, whilst not making any concession in that regard, that the Claimant would be likely to be able to establish that she had made protected disclosures in the form of her email to Mr Barada on 23 April 2019 and her comments in the governance meeting on 19 June 2019.

15. The preliminary, and provisional, view I had reached from my reading prior to the submissions, was also that the email to Mr Barada on 23 April 2019 was likely to amount to a protected disclosure. It raised specific concerns over the movement of beds, and how the procedure might impact on the safety of patients. In my view, it was likely that the Claimant would be able to establish that she had made a disclosure of information, in the sense of conveying facts which, in her reasonable view, tended to show an endangerment to health and safety.

16. In relation to the reasonableness of the Claimant's view, I considered that, at that stage when she was raising her concern for the first time, it would be likely that the Claimant would be able to establish the reasonableness of her view, as she seemed, and still seems, to firmly hold that view. From my limited reading within the bundle it appears that Mr Barada, and potentially others, attempted subsequently to convince the Claimant that the procedure was safe and in accordance with standard practice, and that may impact on the reasonableness of the view expressed by the Claimant in subsequent disclosures, but had no bearing on the initial disclosure.

17. In the circumstances where the Claimant was making a concern about patient safety, I also considered it likely the Claimant would be able to establish that she had expressed a reasonable view that there would be an endangerment to health and safety, in the form of the email to Mr Barada on 23 April 2019.

18. Overall therefore, whilst I could not say that it would necessarily be likely that the Claimant would be able to establish that she had made protected disclosures beyond the first one, I was satisfied that it would be likely that she would be able to establish that her first communication in relation to this matter was a protected disclosure.

19. I then turned to the second question, of whether it was likely that the Tribunal ultimately deciding the case would decide that the reason, or if more than one the principal reason, for the dismissal was that protected disclosure, and I did not consider that it would.

20. The documentary evidence in the bundle, supported by the witness statement of one of the Respondent's employees, the dismissing manager, Ms Hughes-Jones, indicated that the rationale advanced for the dismissal by the Respondent focused very clearly on the complaints made by several employees about the Claimant's behaviour and conduct. There was no evidence to indicate that those complaints had been motivated by the Claimant's disclosures, or indeed that the employees had been aware that anything amounting to a disclosure had been made by the Claimant, it being clear that general concerns about the bed handling process had been raised.

21. The complaints also covered a wide range of events and circumstances, with only tangential reference to the bed handling matter being made as something which led to friction within the area. Beyond that, Ms Hughes-Jones, and the manager dealing with the appeal, were separate from, and independent to, the operational area, and appear only to have had passing knowledge of the concerns having been raised by the Claimant.

22. Overall therefore, whilst as Mr Walters indicated, there is a triable issue in this regard, I could not say that it would be likely that the Tribunal ultimately considering this case will be likely to conclude that the reason, or if more than

one the principal reason, for the dismissal was the Claimant's protected disclosure. I therefore concluded that the Claimant's application for interim relief must be refused.

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Employment Judge S Jenkins
Dated: 14 September 2021

REASONS SENT TO THE PARTIES ON 17 September 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche